No. 96-1482

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEXECON INC., *et al.*,
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a district court, to which a case has been transferred solely for "consolidated pretrial proceedings" under the federal multidistrict litigation statute, 28 U.S.C. § 1407(a), may transfer the case to itself for purposes of trial, notwithstanding section 1407(a)'s explicit command that every such case "shall be remanded" at the conclusion of pretrial proceedings "to the district from which it was transferred."

PARTIES TO THE PROCEEDING BELOW

The following persons or entities were parties to the proceeding in the court of appeals:

Lexecon Inc.
Daniel R. Fischel
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Patricia Hynes
Michael C. Spencer
Stephen R. Steinberg
Joseph Cotchett
Susan Illston

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Lexecon Inc. is a privately held corporation that has no parent companies or subsidiaries that have issued shares to the public.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 28-80) is reported at 102 F.3d 1524. The district court's opinion granting summary judgment in part is reported at 884 F. Supp. 1388; the district court's decision granting defendants' motion to dismiss in part is reported at 845 F. Supp. 1377. The district court's order staying consideration of the remand issue (CR 311[1]) is unreported, as is the court's later decision denying petitioners' request for remand and transferring this case to itself for all purposes, including trial (J.A. 20-21). The decision of the Judicial Panel on Multidistrict Litigation (J.A. 17-19)

[1] CR or "Clerk's Record" refers to the docket number of the document in the record below.

transferring this case to the District of Arizona for coordinated pretrial proceedings is also unreported.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on December 20, 1996. Lexecon Inc. and Daniel R. Fischel filed a timely petition for certiorari on March 18, 1997. This Court granted certiorari on May 19, 1997, limited to the first question presented in the petition. 65 U.S.L.W. 3766.

STATUTES INVOLVED

The federal multidistrict litigation statute, 28 U.S.C. § 1407(a), provides in pertinent part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

The federal transfer statute, 28 U.S.C. § 1404(a), provides in relevant part:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

This case presents a straightforward issue of statutory interpretation.

The federal multidistrict litigation statute authorizes the Judicial Panel on Multidistrict Litigation ("JPML" or "panel") to transfer cases only "for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The statute further provides that "[e]ach action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.* (emphasis added).

Despite this plain statutory command, a divided panel of the Ninth Circuit ruled that an action transferred under section 1407(a) need *not* be remanded at or before the conclusion of consolidated pretrial proceedings. Instead, the majority concluded, a transferee court may use the general federal transfer statute—which authorizes transfer only "to any *other* district or division where it might have been brought" (28 U.S.C. § 1404(a) (emphasis added)) —to override the mandate of section 1407(a) and to "transfer" a case to *itself* for all purposes, including trial.

A. Background and Prior Proceedings.

The Parties' Dispute. Lexecon is one of the nation's leading law and economics consulting firms. Daniel Fischel is a principal of Lexecon and the Lee and Brena Freeman Professor of Law and Business at the University of Chicago Law School. Professor Fischel frequently testifies as an expert in complex class action securities cases.

The respondents—two law firms (Milberg Weiss Bershad Hynes & Lerach ("Milberg") and Cotchett, Illston & Pitre ("Cotchett")) and certain individual members of those firms—are plaintiffs' class action lawyers. They have, in recent years, brought numerous, highly-publicized class action securities lawsuits. Professor Fischel provided what was characterized by the Wall

Street Journal and other commentators as decisive testimony for the defense in a number of those suits, thereby costing the respondent law firms millions of dollars in contingency fees.

Angered by this succession of costly losses, respondents engaged in a wide-ranging effort to ruin Lexecon's reputation and, as one of the respondents put it, to "destroy" Professor Fischel. CR 127, Amended Complaint ¶¶ 1-6. The first step in respondents' scheme was to name Lexecon as a defendant in *Shields v. Keating*, a case heard in the District of Arizona as part of MDL No. 834, *American Continental Corporation/Lincoln Savings & Loan Litigation*. Respondents, who were class counsel in that case, knew that Lexecon had engaged in no wrongdoing, but nevertheless falsely accused Lexecon of complicity with Charles Keating in one of the most notorious financial scandals of this century. Respondents repeatedly acknowledged, even boasted, to third parties that the suit against Lexecon was without merit, but was being pursued as a vendetta against Lexecon and Professor Fischel. CR 127, Amended Complaint ¶¶ 39, 63, 67.

Respondents then used their *Lincoln Savings* complaint against Lexecon in courtrooms around the country, in the press, and with Lexecon's clients and business associates to portray Professor Fischel as a "crook" and a "racketeer" and Lexecon as a firm whose expert credentials could no longer be trusted. CR 127, Amended Complaint ¶¶ 36-37, 46, 56-57, 93-98. In furtherance of their scheme, respondents knowingly used fabricated evidence, attempted to extort perjured testimony, defrauded the courts, and engaged in wholesale document destruction. *See, e.g.*, CR 127, Amended Complaint ¶¶ 43, 69-73, 110.

Lexecon was dismissed from the *Lincoln Savings* case in August 1992. As a result of respondents' misconduct, however, Lexecon lost millions of dollars in fees, and both petitioners suffered significant damage to their reputations. CR 127, Amended Complaint ¶¶ 46-48, 50-55, 103, 117.

The Filing of this Action and Pretrial Proceedings in Chicago. On November 25, 1992, Lexecon and Professor Fischel (hereinafter jointly "Lexecon") filed the instant action in the United States District Court for the Northern District of Illinois, Lexecon's principal place of business and a forum in which many of the alleged wrongful acts occurred. Lexecon sought damages for respondents' malicious prosecution of the *Lincoln Savings* case, abuse of process, tortious interference with petitioners' existing and prospective client relationships, defamation, and commercial disparagement. The case was assigned to Judge James B. Zagel.

After Lexecon filed its complaint in Chicago, Judge Richard M. Bilby, who had presided over the earlier *Lincoln Savings* case in Arizona, somehow obtained a copy and read it. On December 31, 1992, Judge Bilby—although he had no live dispute involving Lexecon before him at the time—*sua sponte* issued an "order" purporting to "clarify" the basis on which Lexecon had been dismissed from the *Lincoln Savings* case. *See* J.A. 33 n.2. In his order, Judge Bilby expressed his view that, contrary to the allegations in Lexecon's complaint and what Judge Bilby himself said at the time he dismissed Lexecon as a "non-settling defendant," the *Lincoln Savings* litigation had not terminated favorably to Lexecon.[2] Judge Bilby proceeded to recount his own understanding of various off-the-record events relating to the dismissal in order, he explained, to give "the judge in Chicago . . . something to rely on." Milberg 9th Cir. Excerpts of Record at 441. Judge Bilby recognized that his recollection of these events made him a potential witness in the Lexecon case in Chicago, but stated, "that ain't going to happen." *Id.* at 437.

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[2] Under Arizona law, favorable termination is a necessary element of a malicious prosecution claim. Accordingly, in its complaint, Lexecon detailed the circumstances leading up to its dismissal from the *Lincoln Savings* suit and explained why those circumstances demonstrated that the suit terminated favorably to Lexecon.

Respondents argued to Judge Zagel that Judge Bilby's order was somehow "preclusive," and that Judge Zagel should stay all proceedings in Chicago. CR 23, at 10. But Judge Zagel indicated that he did not agree with that analysis. Judge Zagel noted that if Judge Bilby had relevant factual knowledge concerning the events, he could be a witness, but that, even if "Judge Bilby's order was written in stone and can never be erased, its effect here based on the law as I currently understand it is likely not to be preclusive." *Id.* In subsequent rulings, Judge Zagel rejected defendants' challenges to the court's jurisdiction, compelled discovery over defendants' objections, and indicated his disagreement with respondents' argument that the Arizona tort of malicious prosecution was unconstitutional. *See* CR 107, at 3, 10; CR 120, at 64-67.

The Transfer of the Case to Arizona. Seeking to avoid Judge Zagel's unfavorable rulings, respondents filed a motion with the JPML pursuant to 28 U.S.C. § 1407 to transfer this case to Judge Bilby and to consolidate it with the *Lincoln Savings* litigation. Before the JPML could rule on defendants' motion, however, Judge Bilby sent a letter to the JPML recusing himself because his "involvement" in the resolution of the underlying case would make it "improper" for him to act as a judge in this case. CR 149, Exh. A, at 1.

Notwithstanding Judge Bilby's recusal, respondents renewed their motion to transfer, asking the JPML to send this case to any other judge in Arizona. Lexecon objected to that motion because none of the other Arizona judges had any experience with the *Lincoln Savings* litigation. Moreover, the few remaining *Lincoln Savings* cases did not involve common questions of fact and either had already been tried or had settlements pending approval, making coordinated *pretrial* proceedings impossible. There was no reason to believe, therefore, that a transfer would "promote the just and efficient conduct of such actions" through "coordinated or consolidated pretrial proceedings." *See* 28 U.S.C. § 1407(a).

In spite of these objections, in June 1993 the JPML granted respondents' motion to transfer. In the panel's view, transfer was appropriate because: (1) there was an extensive "document depository" in Arizona; (2) there might be some opportunity for coordination with an unfinished settlement involving one of the *Lincoln Savings* defendants; and (3) the Ninth Circuit was hearing an appeal that "m[ight] be relevant to the *Lexecon* claims." J.A. 18-19.

Proceedings in Arizona. Following the transfer, the case was assigned to Judge John M. Roll, who had no prior familiarity with this matter or with any of the *Lincoln Savings* cases. No coordinated or consolidated pretrial proceedings of the sort envisioned by the JPML ever ensued. The "document depository" was never used, and was in fact shut down in July 1993; there was no coordination with the unfinished *Lincoln Savings* settlement, pending before a different judge, which was completed in February 1994; and the Ninth Circuit appeal that the JPML thought "m[ight] be relevant" was dismissed in June 1993.

Nor were there any identifiable efficiencies in the pretrial process: there were no joint depositions and no coordinated document production. The documents produced in discovery—more than a million pages—were all kept in Illinois, and only one of the 42 deponents and potential deponents identified by the parties resided in Arizona. Indeed, once they got the case transferred out of Chicago, respondents did not even propose any coordinated or consolidated pretrial proceedings. The net effect of the transfer, therefore, was to supplant the judge in petitioners' home district who had spent six months working on the case with a new judge thousands of miles away who knew nothing of the matter and had to start from scratch.

By August 1994, the case had been pending in Arizona for more than a year without any coordinated or consolidated pretrial proceedings. Moreover, as noted, the three

factors identified by the JPML as supporting the transfer no longer existed. Accordingly, on August 5, 1994, petitioners moved—pursuant to the procedures specified by the JPML (*see* JPML Rule 14(d))—for the district court to refer the case back to the JPML for remand to the Northern District of Illinois. *See* CR 288. Respondents opposed the suggestion of remand, not because any consolidated or coordinated pretrial proceedings were planned, but rather because merits discovery had not yet been completed *in this case*. Judge Roll deferred decision on the remand issue until the end of discovery. CR 311, at 1. But he offered no justification for continuing to hold onto the case notwithstanding section 1407(a)'s requirement that all such cases "shall be remanded" at or before the conclusion of coordinated pretrial proceedings.

When discovery ended in November 1994, petitioners again asked Judge Roll to comply with the statute and return the case to the JPML for remand to Illinois. Respondents objected to the request, and at this point urged the court to transfer the case to itself for all purposes pursuant to 28 U.S.C. § 1404(a).

Judge Roll once more declined to rule on the motion for remand, or to offer any justification for keeping the case after there was no longer even a pretense of coordinated pretrial proceedings. Instead, he proceeded to make dispositive rulings on virtually all of petitioners' claims. For example, on December 15, 1994, having previously accepted respondents' argument that the Arizona common law tort of malicious prosecution was unconstitutional (the precise argument rejected by Judge Zagel), Judge Roll denied with prejudice petitioners' motion for leave to amend their complaint to comport with his ruling. CR 481, at 1. And, on April 24, 1995, Judge Roll granted summary judgment in favor of respondents on all remaining claims, except for one aspect of Lexecon's defamation claim. *See* 884 F. Supp. at 1397.

On May 5, 1995, the Arizona district court denied petitioners' motion to remand and simultaneously granted

respondents' request that it transfer the case permanently to itself. J.A. 20-21. Without mentioning the language of Section 1407, the court stated that there was "[s]ubstantial authority" establishing that section 1407 does not require a case to return to its original district after coordinated pretrial proceedings are complete. J.A. 20. The court further concluded, again without mention of the relevant statutory language, that 28 U.S.C. § 1404 gave it the "power to transfer this action to itself." *Id.*

Lexecon's Petition for Mandamus. Lexecon believed that the district court's order denying remand and transferring the case to itself violated sections 1404 and 1407 and subjected the company to potentially irreparable harm —forcing it to go to trial in a forum thousands of miles from home where "there was much popular feeling" against entities that, like Lexecon, were alleged to have been involved in the Charles Keating/Lincoln Savings scandal. J.A. 74 (Kozinski, J., dissenting). Lexecon thus petitioned the Ninth Circuit for a writ of mandamus.

The Ninth Circuit held oral argument on the mandamus petition, but eventually determined that extraordinary relief was not warranted. J.A. 23-25. The two-judge majority acknowledged that the text of section 1407 provided an apparently "clear statutory mandate" and that the court "might well" decide on direct review that the district court's transfer decision was unlawful. J.A. 24, 25. Ultimately, however, the majority accepted respondents' argument that mandamus was unnecessary because Lexecon could seek review of the denial of remand and the self-transfer on direct appeal following a final judgment. J.A. 23.

Judge Kozinski dissented. He would have issued the writ to correct the district court's "egregious" error in "disregard[ing] the statutory mandate" of sections 1404 and 1407. J.A. 25, 25-26 (Kozinski, J., dissenting). In Judge Kozinski's view, it was "hard to imagine a clearer statutory

command" than that contained in section 1407, and mandamus should be granted to "say[] loud and clear that the Multidistrict Panel assigns cases only for pretrial proceedings." J.A. 25, 26 (Kozinski, J., dissenting). "When it comes to conducting a trial (and resolving other dispositive matters)," Judge Kozinski stressed, "plaintiffs retain their ancient right to select the forum." J.A. 27 (Kozinski, J., dissenting).

Trial. Trial on the remaining defamation issue—which was governed by Illinois law—then went forward in the District of Arizona. The Milberg respondents prevailed in a jury trial, and the district court entered final judgment. CR 681, 684.[8]

B. The Decision Below.

On appeal, a different and sharply divided panel of the Ninth Circuit affirmed the district court's transfer rulings in all respects. Judge Kozinski was the only member of this panel who had also ruled on the mandamus petition.

The majority, relying on "longstanding practice and the efficiency arguments" (J.A. 40), found no flaw in the district court's refusal to remand and its decision to transfer this case to itself. Such transfers, the majority stated, are authorized by the JPML's rules and by a series of court of appeals and district court decisions. J.A. 39 & n.3 (collecting cases). The majority further concluded that, in multidistrict litigation, the judicial interest in "efficien[t]" disposition of cases "trump[s]" the "usual deference to a plaintiff's choice of forum." J.A. 40 & n.5. Finally, the majority suggested that section 1407 is concerned only with the powers of the JPML and thus does not disturb

[8] Shortly before trial, on June 7, 1995, the district court entered a final judgment in favor of the Cotchett Respondents, who were not implicated in the defamation count. CR 602. Lexecon filed a timely appeal from that judgment, and that appeal was consolidated with Lexecon's later appeal from the final judgment for the Milberg respondents.

the "traditional powers of the district court to which a case has been transferred." J.A. 41.

Judge Kozinski again dissented. Expanding on his earlier opinion, he stressed that self-transfer conflicts with the plain language of section 1407 and with Congress's explicit refusal to authorize multidistrict transferee courts to conduct trials. J.A. 57-58 (Kozinski, J., dissenting). Nor could self-transfer be justified by reference to section 1404(a), whose text states "in plain and simple terms" that a case may be transferred only to " 'any *other* district or division where it might have been brought.' " J.A. 68-69 (Kozinski, J., dissenting) (quoting section 1404(a)). This language, Judge Kozinski explained, cannot be read "to authorize a district court to transfer a case to itself." J.A. 69 (Kozinski, J., dissenting). Accordingly, Judge Kozinski would have reversed the judgment below and vacated all the district court's rulings issued after August 1994, when Lexecon first sought a remand and it was clear that "all coordinated and/or consolidated pretrial proceedings—to the extent there ever were any—had come to an end." J.A. 79 n.22 (Kozinski, J., dissenting).

SUMMARY OF ARGUMENT

The lower federal courts have illegitimately converted the multidistrict litigation statute into a mechanism for shuttling entire cases off to far-flung districts for trial in forums that plaintiffs would never have chosen. As Judge Kozinski explained, Congress intended the multidistrict litigation statute to preserve plaintiffs' choice of forum, while "tak[ing] advantage of consolidated or coordinated discovery with other cases having a common factual nucleus." J.A. 57 (Kozinski, J., dissenting). Since the law was enacted, however, federal judges have "develop[ed] proprietary feelings toward the cases entrusted to them" and have "routine[ly]" refused to relinquish them at the end of consolidated pretrial proceedings. J.A. 58 (Kozinski, J., dissenting). Thus, in multidistrict litigation, plaintiff's choice of forum—which, under traditional principles,

"should rarely be disturbed" (*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947))—has "devolved to the significance of a tailbone or an appendix." J.A. 71 (Kozinski, J., dissenting).

This practice of "self-transfer" cannot be reconciled with the language of either section 1407 or section 1404. It is directly contrary to all evidence of congressional intent and to the historical right of plaintiffs to choose their forum for trial. And it has been criticized as a usurpation of legislative authority by a host of scholarly commentators—including Professor Charles Alan Wright, who has filed a brief in this Court supporting petitioners.

A. Congress has said in language "clear as sunlight" (J.A. 57 (Kozinski, J., dissenting)) that multidistrict transfers are only for "coordinated or consolidated pretrial proceedings." No later than the conclusion of such proceedings, these cases "shall be remanded" to the original districts from which they were transferred. 28 U.S.C. § 1407(a).

Accordingly, a transferee court has no authority to retain a case after its congressionally-granted power to oversee coordinated pretrial proceedings has expired. At that point, the statute's plain terms require that the case be returned to the district court originally chosen by the plaintiff. The practice of "self-transfer," endorsed by the Ninth Circuit here, defies this unambiguous statutory command and is thus unlawful.

The general federal transfer statute, 28 U.S.C. § 1404(a), provides no basis for circumventing the mandate of section 1407(a). The transferee court's entire authority over the case derives from section 1407(a) and is therefore circumscribed by its terms. The transferee court may not, in the exercise of a limited power to conduct coordinated pretrial proceedings, claim permanent jurisdiction over the entire case. Indeed, the recognition of such a power would render section 1407's express requirement that cases "shall be remanded" at the conclusion of consolidated pretrial proceedings utterly meaningless. Under such a theory, remand would not be mandatory at all, but, rather, would be entirely within the discretion of the transferee court. That result cannot be squared with the plain text of section 1407.

Furthermore, section 1404(a) itself states—again in remarkably direct language—that a court may transfer a case only to some *"other* district," not to itself. There is simply no reasonable way to infer from the plain English of that provision that Congress intended to permit self-transfer.

B. The legislative history of section 1407(a) confirms what its language so plainly states. Congress understood that it was authorizing transfers solely to ease pretrial burdens; at or before the conclusion of coordinated pretrial proceedings, the case must return to the forum where the plaintiff chose to file suit.

Indeed, the federal judicial report that provided the basis for the new legislation offered express assurances that the proposed statute would not disturb the plaintiff's choice of forum for trial. And the House Report accompanying the legislation confirmed that section 1407(a) was not to "affect the place of trial in any case"; subsequent "amendments" to the statutory language would be necessary to permit multidistrict transfers for all purposes.

C. The clear meaning of the federal statute, reinforced by unequivocal legislative history, cannot properly be ignored on the strength of past practice or judicial judgments as to wise policy. Congress established the relevant policy —a balance of efficiency and respect for plaintiffs' historical right to choose their forum—in the text of section 1407(a). And, as the Court recently made abundantly clear in *Amchem Products, Inc. v. Windsor*, No. 96-270 (U.S. June 25, 1997), the judiciary may not alter that balance, no matter how deeply entrenched its practices nor

how strong its beliefs as to the advisability of an alternative scheme.

In any event, the Ninth Circuit's policy analysis is misguided. Permitting self-transfer encourages forum-shopping under the guise of limited multidistrict transfers, is unnecessary to achieve efficient results in appropriate cases, and will often (as here) lead to grossly inefficient transfers that would never have been justified under the standards of section 1404.

ARGUMENT

THE MULTIDISTRICT LITIGATION STATUTE AUTHORIZES TRANSFERS ONLY FOR "COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS" AND REQUIRES THAT A CASE BE REMANDED TO THE PLAINTIFF'S CHOSEN FORUM AT OR BEFORE THE CLOSE OF THOSE PROCEEDINGS.

A. The Plain Language of the Multidistrict Litigation Statute Requires Remand When Consolidated Pretrial Proceedings Are Complete.

1. The most fundamental of all rules of statutory interpretation is that courts must adhere to the plain language—the "ordinary English"—of the laws that Congress has enacted. *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S. Ct. 1103, 1111 (1996). Indeed, no principle is more central to this Court's jurisprudence than that "courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). As this Court recently admonished: " 'Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.' " *United States v. Gonzales*, 117 S. Ct. 1032, 1036 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)).

This bedrock rule of adjudication is dispositive here. The language of section 1407(a) is clear. The statute authorizes transfers only for "coordinated or consolidated pretrial proceedings." 47 U.S.C. § 1407(a). If a case has not been concluded by the time such consolidated proceedings are complete, it *must* be returned to the district where the case was initially filed: "Each action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.* (emphasis added).

One does not "have to stare very long at that statutory language" to divine its meaning. J.A. 57 (Kozinski, J., dissenting). Congress granted multidistrict transferee courts only the carefully circumscribed authority to preside over consolidated pretrial proceedings, and a case transferred under section 1407(a) must be returned to the plaintiff's chosen forum at or before the time when such proceedings are over—unless the case has been "terminated" during consolidated proceedings.

In contrast, when Congress wanted to permit transfer for all purposes, including trial, it did so expressly. *See* 28 U.S.C. § 1407(h) ("the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, *for both pretrial purposes and for trial*, any action brought under section 4C of the Clayton Act") (emphasis added). Here, Congress unequivocally required a remand no later than the conclusion of coordinated pretrial proceedings. As Professor Wright has explained, the "explicit" and "mandatory" language of section 1407(a) "leaves no room for the transferee court or the [JPML] to exercise discretion whether to remand the case." Brief of Charles Alan Wright as *Amicus Curiae*

Supporting Petitioner 3-4 (Apr. 11, 1997) (filed in support of Lexecon's petition for a writ of certiorari).[4]

2. Although the Ninth Circuit's decision on this issue was grounded largely in the majority's policy preferences —a mode of statutory analysis that we address below— the court did make some attempt to address the language of section 1407(a) and to wring a different meaning out of its text. In particular, the court of appeals suggested that the duty to remand cases applies only to the JPML, not the transferee court. On this theory, a transferee court is free to transfer a case to itself for all purposes pursuant to 28 U.S.C. § 1404(a) without regard to the JPML's express duty under section 1407(a) to remand the case back to the original district before trial. *See* J.A. 41-42. This argument is fatally flawed in at least three respects.

First, in ruling on a motion to remand, the transferee court exercises authority *delegated* by the JPML itself. *See* JPML Rule 14(d). In executing that delegated authority, the district court has no more discretion to refuse to remand a case at the end of coordinated pretrial proceedings than the JPML itself would have if it were to handle such a request itself in the first instance. The

[4] Even respondent Milberg has recognized the force of this language. In a brief filed in May of this year, as counsel in another proceeding, Milberg declared unequivocally that the language of section 1407 "*mandates* that a transferee court remand a transferred action for trial once consolidated pretrial proceedings are complete and its authority under section 1407(a) has thus ended." Class Plaintiffs' Memorandum in Opposition to the Motion to Transfer the Trial of the Kayne Action to the Eastern District of New York, *In re MTC Elec. Technologies Shareholder Litig.*, No. CV-94-1763 (JG) (E.D.N.Y. May 2, 1997), at 3 (emphasis added). Milberg further explained that any attempt to retain a case after such proceedings were complete would "ignore[] the plain mandate of 28 U.S.C. § 1407(a)." *Id.* For the convenience of the Court, Lexecon has lodged copies of this document with the Clerk's office.

JPML cannot alter or broaden its authority by delegating it.[5]

Congress provided only one exception to the JPML's mandatory duty to remand the case at the end of consolidated proceedings: where the case has been "terminated" during pretrial proceedings. 28 U.S.C. § 1407(a). The Ninth Circuit's interpretation would create a second exception that appears nowhere in the statute and that would swallow the rule. Under the court of appeals' reading, Congress's unequivocal command that a case "shall be remanded" would be transformed into a meaningless suggestion that the case "shall be remanded unless the transferee court decides it should not be." But courts have no power to add exceptions to the ones that Congress has expressly provided. *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980); *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942). Much less may they imply an exception that would render a specific and mandatory duty meaningless. *See Walters v. Metropolitan Educ. Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect"); *Lane v. Peña*, 116 S. Ct. 2092, 2100 (1996) (no statutory provision should be understood to be superfluous).

Second, the plain language of section 1407 *does* specifically limit the transferee court's own authority over a case.

[5] For this reason, it is bizarre for the Ninth Circuit to suggest (J.A. 43) that Lexecon should have sought relief directly from the JPML and that its failure to do so somehow left the district court with no choice but to transfer the case to itself "to avoid the absurdity of indefinitely suspended litigation, the pretrial proceedings of which have come to a close." Under the JPML's rules, the proper practice was for Lexecon to bring its section 1407 argument to the transferee district court, and not the JPML, in the first instance. *See* JPML Rule 14(d). That makes sense since it is the transferee court that will know when consolidated pretrial proceedings have ended. In carrying out that delegated responsibility, however, the district court must adhere to the same statutory limitations as the JPML in deciding the remand issue.

Section 1407 "authoriz[es] transfers *only* for pretrial purposes." *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (emphasis added), *aff'd on other grounds sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). Section 1407(a) provides:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district *for coordinated or consolidated pretrial proceedings*.

28 U.S.C. § 1407(a) (emphasis added). Similarly, section 1407(b) explains:

> *Such coordinated or consolidated pretrial proceedings* shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation.

28 U.S.C. § 1407(b) (emphasis added).

A transferee court has no authority to expand its powers beyond what Congress has granted it under the express terms of the statute, and the statute makes clear that the transferee court's authority is limited to the conduct of coordinated pretrial proceedings. Accordingly, a transferee court has no proper alternative but to relinquish a multidistrict case at the end of such consolidated pretrial proceedings. *See generally Finley v. United States*, 490 U.S. 545, 547 (1989) (" 'courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction' ") (quoting *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.)).

Indeed, if the Ninth Circuit were correct, the specific legislative compromise that is at the heart of section 1407 would be completely undone. The text of section 1407 makes plain that Congress was willing to allow plaintiffs to be sent to far-off—and potentially very inconvenient—forums, but only for the limited duration of coordinated

pretrial proceedings. At the end of those proceedings, plaintiffs are guaranteed that their cases will be returned to the forum they originally selected. Under the Ninth Circuit's interpretation, that carefully crafted legislative compromise, embodied in the unambiguous text of section 1407, is entirely defeated. A transferee court could use the general federal transfer statute to do exactly what Congress prohibited in section 1407: convert its circumscribed authority to supervise *only* consolidated pretrial proceedings into a boundless license to preside over the entire case. It is well-established, however, that courts cannot construe general statutory provisions in a way that would negate more specific ones. *See Crawford Fitting Co. v. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("a specific statute will not be controlled or nullified by a general one"); *Morales v. TWA*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general").

Third, and finally, even if section 1407 could somehow be construed to allow transferee courts to entertain section 1404(a) transfer motions, the Ninth Circuit's approval of "*self*-transfer" would still crash head-on into the language of section 1404(a).

Section 1404(a) states that "[f]or the convenience of parties and witnesses, in the interest of justice, *a district court* may transfer any civil action *to any other district or division* where it might have been brought" (emphasis added). The only linguistically reasonable interpretation of that language is that the "other district court" that may receive the case stands in contrast to the "district court" that "may transfer" it. *See* J.A. 68-69 & n.9 (Kozinski, J., dissenting). Section 1404(a), accordingly, contemplates transfers to any district where venue would be proper "*other*" than the one where the case is pending. It provides no authority for a court to transfer a case to itself.

It is no answer to suggest that, in ruling on a transfer motion, the transferee court somehow "stands in the shoes"

of the transferor court, thus making the transferee court itself an "other" court for purposes of section 1404. This "Rube Goldberg argument" (J.A. 69 n.9 (Kozinski, J., dissenting)) finds no support in the text of section 1407. Nothing in that section suggests that a transferee court is merely a surrogate for the transferor court when it is presiding over consolidated pretrial proceedings. Indeed, for section 1404 to authorize self-transfer under this theory, one would have to imagine that the transferee court *becomes* the transferor court for the purposes of effectuating the transfer, and then—somewhere between the subject and object of the sentence—suddenly transforms itself back into the transferee court for the purpose of being the "other" district court that may accept the transfer. The language of section 1404(a) provides no support for such a metaphysically challenging transformation. And surely nothing in that provision suggests that Congress intended such metaphysics to override section 1407's unequivocal remand requirement.

Indeed, the drafters of section 1404(a) could not possibly have meant to authorize self-transfers. Section 1404(a) long predates section 1407. Thus "the possibility that a district court would be in a position to transfer a case to itself was not something anyone at the time could [even] have anticipated," much less intended to authorize. J.A. 69 (Kozinski, J., dissenting). In the words of Professor Wright, "[a] 1948 statute cannot be given a meaning it could not have had when it was adopted in order to provide a result under a 1968 statute that Congress specifically considered and expressly rejected." *Amicus* Br. of Charles Alan Wright at 6.[6]

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[6] An additional reason for not reading section 1404(a) as an expansion of section 1407(a) is that the standards for an all-purpose section 1404(a) transfer are different from those for a limited section 1407(a) transfer. Although both provisions allow transfers "for the convenience of parties and witnesses," only section 1407(a) allows transfers to "promote the just and efficient conduct" of cases. The lower courts, like the Ninth Circuit here, generally rely on judicial efficiency to justify using section 1404(a) to evade section 1407(a)'s remand requirement. But section 1404(a), unlike section 1407(a), does not recognize judicial efficiency as a basis for a transfer. It is therefore a perversion of congressional intent to use the former to expand the latter.

B. The Legislative History Confirms That Multidistrict Transferee Courts May Only Conduct Consolidated Pretrial Proceedings.

For the reasons we have discussed, the language of section 1407(a) is clear and dispositive. No further inquiry is required. *See Estate of Cowart*, 505 U.S. at 475 ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished"). If, however, one looks beyond the plain text of section 1407 to its drafting history, that inquiry only reinforces the plain terms of the statute. As Professor Wright explains, "[t]he legislative history is unambiguous. Congress knew that it was authorizing transfer for pretrial proceedings only and that when those proceedings were ended, the action was to be remanded to the transferor court." *Amicus* Br. of Charles Alan Wright at 4.

Section 1407 had its genesis in a federal judicial report by the Co-Ordinating Committee on Multiple Litigation. The Committee's Report emphasized that the proposed statute was designed to address "the additional litigation costs which are engendered in multi-district litigation through overlapping and conflicting discovery," and thus would affect "only the pre-trial stages in multi-district litigation." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499 (J.P.M.L. 1968) (reprinting Committee Report). The Report stated unequivocally that the proposed legislation "would not affect the place of trial in any case" and, accordingly, that "[t]he major innovation proposed is transfer solely for pre-trial purposes," which would achieve "efficien[cy] and econom[y] . . . without losing the benefits of local trials in the appropriate districts." *Id.* The

Committee stressed that these limitations on the scope of multidistrict transfers would "maximize the litigant's traditional privileges of selecting where, when, and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multiparty trials." *Id.*

Senator Tydings, the primary Senate sponsor of the bill, evinced the same understanding of the proposal's limited scope. "[F]or purposes of this legislation," he emphasized, "we are not talking about the jury trial—we are talking about the pretrial proceedings, the depositions and discoveries. And under this bill, when . . . deposition and discovery is completed, then the original litigation is remanded to the transferor district for trial." *Multidistrict Litigation: Hearings on S. 3815 and S. 159 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, Part II, 90th Cong., 1st Sess. 109-10 (1967).

The same intent to authorize only limited multidistrict transfers is evident in the House Report accompanying the bill that became section 1407. The Report states unequivocally that the proposed legislation "would not affect the place of trial in any case." H.R. Rep. No. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. As the Report explained:

> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings.

1968 U.S.C.C.A.N. at 1901.

The House Report gives three reasons for restricting transfers to coordinated pretrial proceedings. First, "[t]he experience of the Coordinating Committee [on Multiple Litigation] was limited to pretrial matters and the committee considers it desirable to keep this legislative proposal within the confines of that experience." Second, "trial in the originating district is generally preferable from the standpoint of the parties and the witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district." Finally, "the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings." *Id.* at 1901-02. *Accord* S. Rep. No. 90-454, at 5 (1967) (emphasizing the same points in nearly identical language).

The House Report, moreover, expressly noted that if "future experience" were to demonstrate that "consolidation and coordination for trial purposes" was desirable, Congress would have to enact "amendments to the present language." 1968 U.S.C.C.A.N. at 1902. *Accord* S. Rep. No. 90-454, at 5 (similarly emphasizing that "amendments" would be necessary to allow section 1407 cases to be consolidated for trial).[7]

Congress, in short, did not understand either plaintiffs' historical prerogative to choose the forum for the litigation or the efficiency benefits of local trials to be a minor

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[7] The Ninth Circuit incorrectly cited the House Report in support of its conclusion that Congress contemplated the use of self-transfer. J.A. 41-42. The court's analysis, however, rests on highly selective quotations from passages in which Congress noted that the statute did not do away with other mechanisms for transfer, such as section 1404(a). *Id.* As Judge Kozinski explained (J.A. 66-68 n.8), the quoted passages, when read in context, clearly refer to the possibility of transfer by the court in which the case was filed, *not* by the transferee court. Only that understanding is consistent with the House Report's repeated statements that section 1407(a) would not affect the place of trial in any case and that further statutory amendments would be necessary to allow a transferee court the authority to keep a case for trial. *See* 1968 U.S.C.C.A.N. at 1902; *see also* Report of the Co-Ordinating Committee on Multiple Litigation, 298 F. Supp. at 499 (proposed statute would not "exclude transfer under other statutes [such as 28 U.S.C. § 1404(a)] *prior to or at the conclusion of* pre-trial proceedings") (emphasis added).

concern that could be cast aside at the whim of a transferee court. Rather, these considerations were central to Congress's deliberations on section 1407 and led directly to its decision to authorize only *limited* multidistrict transfers. Section 1407 was thus the result of a considered congressional judgment that the interests of the parties and the courts would best be served by *not* permitting the transferee court to retain the case after the conclusion of consolidated pretrial proceedings. The courts have no choice but to abide by that congressional judgment.

C. The Ninth Circuit's Policy Arguments Do Not Justify a Different Result.

The Ninth Circuit favors a different balance from the one struck by Congress in section 1407. But, contrary to the Ninth Circuit's evident belief (J.A. 42), the practice of self-transfer cannot be justified by respect for longstanding practice or by efficiency concerns. This Court's decisions make clear that neither of those considerations provides any reason to ignore the clear meaning of a federal statute, buttressed in this instance by unequivocal legislative history.

Beyond this, the Ninth Circuit's policy analysis is itself misguided. Permitting self-transfer is not necessary to achieve efficient results in appropriate cases, it encourages forum-shopping, and it will often (as here) lead to transfers that could not possibly be justified under the standards of section 1404.

1. The court of appeals majority stated that a key factor in its decision was that the Arizona district court's self-transfer decision comported with "longstanding practice." J.A. 39-40 & n.3. Citing its "[r]espect for our brethren," the majority was unwilling to "accuse the JPML of violating the statute that created it" or to second-guess the many courts that had engaged in self-transfer. J.A. 41 n.7.

We do not dispute that the lower court decisions addressing this issue accord with the Ninth Circuit's conclusion.[8] Nor do we contest that the JPML Rules—which, unlike the Federal Rules of Civil Procedure, are not reviewed by this Court prior to becoming effective—codify this district court practice.[9]

Those facts, however, are beside the point. As Professor Wright has so aptly explained, the federal courts obtain their authority by Act of Congress, not by "adverse possession." *Amicus* Br. of Charles Alan Wright at 8. Past practice, therefore, is no excuse for ignoring a clear congressional command: "'Age is no antidote to clear inconsistency with a statute.'" *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2149 (1995) (quoting *Brown v. Gardner*, 115 S. Ct. 552, 557 (1994)).

This Court has accordingly reversed erroneous statutory interpretations even where they were supported by precedents from *every* circuit court. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994) (overturning practice upheld by

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[8] *See, e.g., Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 819-20 & n.7 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); *In re Tax Refund Litig.*, 723 F. Supp. 922, 924 (E.D.N.Y. 1989); *In re The Dow Co. "Sarabond Products" Liab. Litig.*, 664 F. Supp. 1403, 1403-04 (D. Colo. 1987); *In re Caesars Palace Sec. Litig.*, 360 F. Supp. 366, 374 (S.D.N.Y. 1973); *In re Aircrash Near Duarte, Cal.*, 357 F. Supp. 1013, 1015 (C.D. Cal. 1973); *Greyhound Computer Corp. v. I.B.M. Corp.* 342 F. Supp. 1143, 1145 (D. Minn. 1972); *In re Viatron Computer Systems Corp. Litig.*, 86 F.R.D. 431, 432-33 (D. Mass. 1980); *In re Master Key Antitrust Litig.*, 70 F.R.D. 23, 28 (D. Conn. 1975); *In re Penn Central Commercial Paper Litig.*, 62 F.R.D. 341, 345 (S.D.N.Y. 1974), *aff'd sub nom. Shulman v. Goldman, Sachs & Co.*, 515 F.2d 502 (2d Cir. 1975).

[9] *See* JPML Rule 14(b) ("Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district.").

every federal circuit); *Finley v. United States*, 490 U.S. 545 (overturning district court practice that had been approved by overwhelming consensus of lower court judges); *Brown v. Gardner, supra* (invalidating 60-year-old agency interpretation). And there is no reason at all to perpetuate such an error where, as here, the relevant court decisions reveal "a remarkable lack of critical attention to th[e] issue." J.A. 60-61 (Kozinski, J., dissenting) (noting that the Second Circuit's 1971 *Pfizer* decision "with its one page of analysis, is the only court of appeals opinion that seriously addresses the issue").

In fact, when self-transfer has been subjected to disinterested critical analysis, the practice has been widely condemned as an unlawful attempt to "do[] by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial." Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779, 809 (1985). A host of commentators have determined that self-transfer "does not comport with the express language of section 1407 or section 1404 or with section 1407's legislative history." Ross D. Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 Geo. Wash. L. Rev. 1145, 1159 (1989).[10]

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[10] Trangsrud, 70 Cornell L. Rev. at 809 ("The reasoning in these cases is demonstrably wrong."); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Pa. L. Rev. 711, 734 (1991) ("[A] transferee court's use of § 1404(a) sets Congress's carefully crafted plan for multidistrict litigation on its head."); Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 Fordham L. Rev. 41, 64 (1971) (the language and legislative history of section 1407(a) are so clear that it "originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion."); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. Chi. L. Rev. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause . . . implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters.") (internal footnote omitted); *Report of the America Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC American Corp.*, 59 Antitrust L.J. 271, 302 (1990) ("The use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 Mem. St. U. L. Rev. 841, 866 (1993) ("It is a leap in logic to conclude that causes of action not terminated upon dispositive motions should be retained in the transferee court under the rubric of § 1404(a), when the statutory language of § 1407 explicitly directs remand to the transferor court.").

Nor does the existence of a JPML rule permitting self-transfer transform an unlawful practice into a lawful one. Congress expressly provided that the JPML's rules must be consistent with its enabling statute and, indeed, all of federal law. *See* 28 U.S.C. § 1407(f) ("The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure"). *See also Johnson v. Manhattan Ry.*, 289 U.S. 479, 503 (1933) (invalidating local court rule that was inconsistent with powers granted by Congress).

JPML Rule 14(b) violates that fundamental requirement. As discussed above, section 1407 states that a transfer is only for "coordinated or consolidated pretrial proceedings" and that each case "shall be remanded" following pretrial proceedings "unless it shall have been previously terminated." 28 U.S.C. § 1407(a). The JPML rule, on the other hand, states:

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, *unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406.*

JPML Rule 14(b) (emphasis added). The italicized language simply rewrites the JPML's enabling statute and

adds an excuse for failure to remand that the statute does not recognize and does not permit. The rule is therefore flatly inconsistent with section 1407's plain text and provides no basis to affirm the Ninth Circuit's determination.

2. Nor can self-transfer be justified on the theory that it "strongly promotes judicial efficiency." J.A. 42. That argument is both irrelevant and wrong.

a. The initial point is, again, an obvious one. The federal courts must adhere to the language of the statutes that Congress has enacted and cannot disregard that language no matter what their own views of wise policy may be. Indeed, this Court recently reiterated this point in the plainest possible terms. In *Amchem Products, Inc. v. Windsor*, the Court acknowledged that the kind of class action settlement approved by the trial court might well be "the most secure, fair, and efficient means of compensating victims of asbestos exposure." *Amchem*, slip op. at 35. The complete answer to that argument, however, was that "Congress . . . has not adopted such a solution." *Id.* The issue of "overriding importance," therefore, was not the judiciary's view of prudent policy, but, rather, what "Congress [has] ordered." *Id.* at 26.

Finley v. United States is to the same effect. As in *Amchem*, the *Finley* Court acknowledged that the exercise of so-called pendent-party jurisdiction over state claims resulted in "efficiency and convenience" by allowing for the consolidation of related issues in a single proceeding. 490 U.S. at 555. Nevertheless, because the plain meaning of the relevant statutes demonstrated that Congress had not granted federal courts any such authority, the Court held that they lacked the power to hear such pendent-party claims. *See id. See also Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (Court is not free to pursue policy objective at expense of "unnatural" textual interpretation; "[o]ur task is to apply the text, not to improve upon it"); *Touche Ross &*

Co. v. Reddington, 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.").

This repeatedly enunciated principle applies with full force here. Congress balanced the relevant policies when it enacted section 1407. It decided that potential cost savings justified sending plaintiffs to distant forums for purposes of coordinated discovery. Congress further concluded, however, that when such proceedings were over, competing policies dictated a mandatory remand to the plaintiff's chosen forum. *See* 1968 U.S.C.C.A.N. at 1900 (emphasizing, among other things, that "trial in the originating district is generally preferable from the standpoint of the parties and the witnesses" and that "local discovery proceedings" will generally be necessary). The judiciary is not free to strike a different balance. It may not "trump" (J.A. 40 n.5) the plain language of sections 1404 and 1407 based on its own notions of wise judicial administration.

b. In any event, even on its own terms, the Ninth Circuit's policy-based reasoning fails to support its conclusion. Contrary to the Ninth Circuit's analysis, there is no need to disregard the plain language and evident intent of section 1407 to obtain, in appropriate cases, the benefits of transfers for all purposes, including trial.

Litigants who believe that a case should proceed in a venue different from where it was first filed have a choice. They may (1) petition the JPML for a section 1407 transfer for coordinated pretrial proceedings or (2) ask the district court where the case was filed for a section 1404 transfer for all purposes, including trial.[11] Thus, in this

[11] Indeed, in appropriate cases, they may even file a section 1404 motion in the transferor court, after the case has been remanded pursuant to section 1407, seeking to return the case to the multidistrict transferee court for all purposes. *See* Report of the Co-Ordinating Committee on Multiple Litigation, 298 F. Supp. at 499.

case, if respondents were convinced that the sensible course of action was to hold the trial—not just coordinated pretrial proceedings—in Arizona, the proper course was to file a section 1404 motion with the Chicago court. They never did so, and for good reason.[12] That strategic decision, however, does nothing to diminish the evident fact that, if respondents could have satisfied well-established section 1404 standards—that transfer to Arizona accorded with "the convenience of parties and witnesses" and was "in the interest of justice"—they could have obtained precisely the benefits that the Ninth Circuit emphasized.

Indeed, this case illustrates the danger of distorting section 1407 to allow for transfers for all purposes. Armed with the knowledge that courts will "routine[ly]" (J.A. 58 (Kozinski, J., dissenting)) "self-transfer" cases once they obtain them under section 1407, respondents—who were unhappy with their trial court judge—had every incentive to seek a section 1407 transfer even though they had no genuine interest in "coordinated or consolidated pretrial proceedings." And they fought to keep the case in Arizona

[12] As Judge Kozinski explained, under normal section 1404(a) standards, a venue transfer for trial "from Chicago to Arizona would never have been granted." J.A. 72 (Kozinski, J., dissenting). Neither the parties, the witnesses, nor the lead trial attorneys resided in Arizona, and the relevant documents were being kept in Chicago. Moreover, the Arizona court, unlike the Chicago court, could not be expected to have any expertise in the Illinois common law that governed at trial. Indeed, the only reason for holding the trial in Arizona was, perversely, that Lexecon had already endured enormous cost and inconvenience in litigating in that forum. The trial court reasoned essentially that, since Lexecon had already been "dragged hundreds of miles from [its] home district" and forced to remain in that remote district even after there was no possibility of benefitting from "common proceedings" or "coordinated discovery," there was no sense in turning back at the trial stage. J.A. 27 (Kozinski, J., dissenting). While there may be some "warped logic" (*id.*) to that reasoning, the Arizona proceedings certainly could not be rationalized as necessary to promote efficient judicial administration.

even after any possibility of consolidated pretrial proceedings had vanished.

If this Court were to affirm the Ninth Circuit, the decision would lead to an onslaught of flimsy section 1407 transfer motions motivated solely by an illegitimate interest in having a different judge preside over dispositive motions and, if necessary, a trial. By contrast, a clear statement by this Court that section 1407 means what it says—that cases are transferred *only* for coordinated pretrial proceedings and must be remanded no later than the end of such proceedings—will ensure that section 1407 is not abused. Instead, motions will be filed only when litigants have a genuine interest in obtaining "coordinated or consolidated pretrial proceedings," and not when they are simply trying to obtain a section 1404 transfer by improper means.

* * * * *

In sum, Congress balanced potentially competing efficiency and policy concerns by authorizing only *limited* multidistrict transfers for consolidated pretrial proceedings, while allowing for broader transfers in those instances where the *transferor* court concludes that they are appropriate under established standards. Certainly, there are other ways of handling these complex cases, and the judiciary may well be able to devise a different system that it believes would be more beneficial. If it does, it may (as it has in the past) petition the legislature for enactment of that scheme. *See* 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3866, at 620 (2d ed. 1986) ("If the experience in handling multidistrict litigation indicates that maximum efficiency can be obtained by allowing some cases to be transferred for consolidated trial, as well as pretrial management, then the statute should be amended to specifically so provide.").

In the meantime, however, the text of section 1407(a) requires remand at or before the time when consolidated pretrial proceedings are complete. Because the court be-

low ignored that explicit statutory requirement and thus allowed this case to be adjudicated in an unlawful venue, its judgment must be reversed. *See Olberding v. Illinois Central R.R.*, 346 U.S. 338, 340 (1953); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 184-85 & n.18 (1979). *See also Amicus* Br. of Charles Alan Wright at 8 ("Venue differs from subject-matter jurisdiction in that it is waivable. But absent waiver, it is as much for Congress to say in which federal court a case shall be tried as it is for it to say whether a case can be heard at all by the lower federal courts.").

CONCLUSION

The judgment of the Ninth Circuit should be reversed and the matter remanded with instructions to vacate all district court orders after the conclusion of consolidated pretrial proceedings and to return this case to the Joint Panel on Multidistrict Litigation for remand to the Northern District of Illinois.

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